**February 11, 2005**

**DECISION AND ORDER**

**OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: Paul E. Guy, Jr.

Date of Filing: December 8, 2004

Case Number: TFA-0080

This Decision concerns an Appeal filed by Paul E. Guy, Jr. from a determination issued to him by the Chief Counsel of the Department of Energy's (DOE) Savannah River Operations Office. That determination was issued in response to a request for documents that Mr. Guy submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, and the Privacy Act (PA), 5 U.S.C. § 552(a), as implemented by the DOE in 10 C.F.R. Part 1008. In that determination, the Chief Counsel withheld portions of certain documents from Mr. Guy. This Appeal, if granted, would require that the Chief Counsel release most of the withheld information.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release.

The PA requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. A PA request requires only that an agency search systems of records, while the FOIA generally requires a broader search. The DOE regulations define a system of records as being "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m).

## I. Background

In his FOIA/PA request, Mr. Guy sought access to all documents generated by a named contractor employee during his investigation of Mr. Guy's complaints against a named employee of the DOE's Office of Safeguards and Security, and all documents relating to the cost of this investigation. In her response, the Chief Counsel informed Mr. Guy that a search of all systems of records pursuant to the PA had failed to identify any responsive documents. However, she also stated that a search of other records pursuant to the FOIA had resulted in the location of a number of responsive documents. These documents were released to Mr. Guy in their entireties, with the exception of

Documents 2, 3.1 and 5, which were released with portions withheld pursuant to Exemptions 3, 5 and 6 of the FOIA. 5 U.S.C. § 552(b)3, (b)5 and (b)6. In his Appeal, Mr. Guy challenges the Chief Counsel's application of Exemptions 5 and 6. *

## II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears)*. The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*).

In this case, the Chief Counsel relied upon the "deliberative process" privilege of Exemption 5. This privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be an inter- or intra-agency memorandum that is both pre-decisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

The Chief Counsel withheld portions of Document 3.1 under Exemption 5. Document 3.1 is the report generated by the contractor employee who investigated Mr. Guy's complaints. The withheld portions of this Document consist of the sections entitled "Observations/Findings," "Conclusions," and "Recommendations." In his Appeal, Mr. Guy contends that this document is not "pre-decisional" because the final decision regarding his complaints has already been issued.

This argument is not well taken. The term "pre-decisional" refers to the point in a particular decision-making process at which the document in question was generated, and the federal courts have consistently held that a document does not lose its pre-decisional character after deliberations have ended and a final decision has been issued. *See, e.g., Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 360 (1979); *May v. Department of the Air Force,*

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*/ He does not challenge the withholding of portions of Document 5 pursuant to Exemption 3 of the FOIA.

777 F.2d 1012, 1014-15 (5th Cir. 1985); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 357 (3rd Cir. 1985).

Furthermore, we have examined Document 3.1 and have concluded that the Chief Counsel properly applied Exemption 5 in withholding the sections set forth above. As an initial matter, the document qualifies as an "inter-agency or intra-agency memorandum" despite the fact that it was prepared by a contractor employee. *See Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 n.2 (D.D.C. 2003). In addition, the withheld material reflects the give-and-take of the deliberative process in that it reflects the opinions of the contractor employee as to the allegations made by Mr. Guy, rather than the final agency position on these matters. Accordingly, we conclude that the Chief Counsel properly applied Exemption 5 in withholding the material in question.

A finding that information can be withheld under Exemption 5 does not end our inquiry. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, although Mr. Guy's interest in gaining access to this information may be substantial, the public interest in the release of the withheld material is negligible. The opinions, preliminary findings and suggestions set forth therein would provide little insight into the workings of the DOE. However, the release of this deliberative material could discourage employees from making honest and open recommendations concerning similar matters in the future. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987). We will therefore not release the portions of Document 3.1 that were withheld under Exemption 5.

The Chief Counsel also cited Exemption 6 in withholding portions of Documents 2 and 3.1. Exemption 6 permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). In order to determine whether information may be withheld under this Exemption, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of such information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991). In determining whether release of the document would further the public interest, the Supreme Court has held that the personal interest of the requester is irrelevant. *Reporters Committee*, 489 U.S. at 772-773. Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*; *see also Frank E. Isbill*, 27 DOE ¶ 80,215 (1999).

The information that was redacted from Documents 2 and 3.1 pursuant to Exemption 6 consists of the names and other identifying information of the employees who were interviewed by the contractor employee during his investigation of Mr. Guy's allegations. In his Appeal, Mr. Guy contends that these employees have no privacy interests in maintaining their anonymity because their names are not the type of personal information that Exemption 6 was meant to protect. Furthermore, Mr. Guy argues that the "Privacy Act Notice" that each interviewee signed, and that together comprise Document 2, serves as a waiver of any privacy interest. That Notice provides, in pertinent part, that

> The information you supply will be used by Management to determine if a breach of the Department of Energy, Savannah River Operations Office Policies has occurred. This information may be furnished to designated officers and employees of the agency and/or departments of the Federal Government in order to resolve the complaint. The information may also be disclosed to any agency of the Federal Government having oversight or review authority with regard to the Equal Employment Opportunity Office activities or to others having reasons published in the Federal Register.

Mr. Guy's contention that the identities of federal employees are generally not the type of personal information that Exemption 6 was designed to protect is correct in the sense that their names, job titles and salaries are matters of public record. However, we have repeatedly found that, while a person has no privacy interest in his or her status as a federal employee, that same person may have a significant interest in maintaining the confidentiality of their participation in an investigation, particularly where, as here, that investigation involves a co-worker. *See, e.g., Technology & Management Services, Inc.,* 27 DOE ¶ 80,232 (1999); *Burlin McKinney,* 26 DOE ¶ 80,172 (1997). This is because a person who is revealed as having participated in an investigation may be subject to coercion, harassment or intimidation based on the mere fact of their participation, or on the content of their statements to investigators. For this reason, we conclude that the witnesses specifically named or identified in Documents 2 and 3.1 maintain a substantial privacy interest in the continued confidentiality of the withheld material.

We further conclude that the witnesses did not waive their privacy interests with respect to release of their identities to Mr. Guy or to the public at large by signing the Privacy Act Notices. As set forth above, those notices specifically describe the people and entities to whom the witnesses' statements may be revealed, and Mr. Guy has not demonstrated that those descriptions apply to him.

Next, we must determine whether there is a public interest in release of the witnesses' identities, and, if so, whether that interest outweighs the witnesses' privacy interests. Simply put, Mr. Guy has not suggested any *public* interest in disclosure, and we are unable to identify any such interest. He does argue that, without access to this information, he will be unable to effectively respond to the information developed during the investigation. However, as previously stated, the interests of the requester are irrelevant in determining whether the release of material withheld under Exemption 6 would further the public interest. *Reporters Committee,* 489 U.S. at 772-773. In fact, we conclude that the public is better served by maintaining the witnesses' confidentiality. Participants in future investigations might be less than totally open and candid in their statements to investigators if they

believed those statements would be publically disclosed, thereby adversely effecting the quality of the information provided. Because the witnesses maintain a substantial privacy interest in the withholding of their identities and there is no ascertainable public interest in disclosure, the Chief Counsel correctly determined that the witnesses' identities should not be released. We will therefore deny Mr. Guy's Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Paul E. Guy, Jr., OHA Case Number TFA-0080, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 11, 2005